

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JERRY A. DYKEMAN,)
Plaintiff,) No. CV-08-00132-JPH
v.) ORDER GRANTING DEFENDANT'S
MICHAEL J. ASTRUE, Commissioner) MOTION FOR SUMMARY JUDGMENT
of Social Security,)
Defendant.)
)
)

BEFORE THE COURT are cross-motions for summary judgment noted for hearing without oral argument on November 14, 2008. (Ct. Rec. 13, 16). Attorney Maureen J. Rosette represents Plaintiff; Special Assistant United States Attorney Stephanie Martz represents the Commissioner of Social Security ("Commissioner"). The parties have consented to proceed before a magistrate judge. (Ct. Rec. 8.) On November 12, 2008, Plaintiff filed a reply. (Ct. Rec. 18.) After reviewing the administrative record and the briefs filed by the parties, the court **GRANTS** Defendant's Motion for Summary Judgment (Ct. Rec. 16) and **DENIES** Plaintiff's Motion for Summary Judgment (Ct. Rec. 13.)

JURISDICTION

Plaintiff filed applications for SSI benefits and DIB on August 25, 2004 (Tr. 72-74, 334-336), alleging onset as of November 1, 2002. (Tr. 358.) The applications were denied

1 initially and on reconsideration. (Tr. 47-50, 53-60.)
 2 Administrative Law Judge (ALJ) Richard A. Say held a hearing on
 3 September 6, 2006. (Tr. 355-373.) Plaintiff, represented by
 4 counsel, and vocational expert Tom Moreland testified. On
 5 November 8, 2006, the ALJ issued a decision finding that plaintiff
 6 was not disabled. (Tr. 21-28.) The Appeals Council denied a
 7 request for review on March 8, 2008. (Tr. 7-10.) Therefore, the
 8 ALJ's decision became the final decision of the Commissioner,
 9 which is appealable to the district court pursuant to 42 U.S.C. §
 10 405(g). Plaintiff filed this action for judicial review pursuant
 11 to 42 U.S.C. § 405(g) on April 25, 2008. (Ct. Rec. 1,4.)

STATEMENT OF FACTS

13 The facts have been presented in the administrative hearing
 14 transcript, the ALJ's decision, the briefs of both Plaintiff and
 15 the Commissioner, and will only be summarized here.

16 Plaintiff was 53 years old on the date of the hearing. (Tr.
 17 356.) He has a high school education and completed building
 18 trades training in 1987. (Tr. 120.) Plaintiff has past work as
 19 glazing windows, repairing appliances and pallets, building
 20 trailers, and as a maintenance worker. (Tr. 94, 103, 198, 367-
 21 368.) He alleges disability as of November 1, 2002, due
 22 obstructive pulmonary disease (COPD) and neck and back problems.
 23 (Tr. 189-190, 207.)

SEQUENTIAL EVALUATION PROCESS

25 The Social Security Act (the "Act") defines "disability"
 26 as the "inability to engage in any substantial gainful activity by
 27 reason of any medically determinable physical or mental impairment
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1 which can be expected to result in death or which has lasted or
2 can be expected to last for a continuous period of not less than
3 twelve months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The
4 Act also provides that a Plaintiff shall be determined to be under
5 a disability only if any impairments are of such severity that a
6 plaintiff is not only unable to do previous work but cannot,
7 considering plaintiff's age, education and work experiences,
8 engage in any other substantial gainful work which exists in the
9 national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).
10 Thus, the definition of disability consists of both medical and
11 vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156
12 (9th Cir. 2001).

13 The Commissioner has established a five-step sequential
14 evaluation process for determining whether a person is disabled.
15 20 C.F.R. §§ 404.1520, 416.920. Step one determines if the person
16 is engaged in substantial gainful activities. If so, benefits are
17 denied. 20 C.F.R. §§ 404.1520(a)(4)(i), 416.920(a)(4)(i). If
18 not, the decision maker proceeds to step two, which determines
19 whether plaintiff has a medically severe impairment or combination
20 of impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii),
21 416.920(a)(4)(ii).

22 If plaintiff does not have a severe impairment or combination
23 of impairments, the disability claim is denied. If the impairment
24 is severe, the evaluation proceeds to the third step, which
25 compares plaintiff's impairment with a number of listed
impairments acknowledged by the Commissioner to be so severe as to
27 preclude substantial gainful activity. 20 C.F.R. §§
28

1 404.1520(a)(4)(ii), 416.920(a)(4)(ii); 20 C.F.R. § 404 Subpt. P
 2 App. 1. If the impairment meets or equals one of the listed
 3 impairments, plaintiff is conclusively presumed to be disabled.
 4 If the impairment is not one conclusively presumed to be
 5 disabling, the evaluation proceeds to the fourth step, which
 6 determines whether the impairment prevents plaintiff from
 7 performing work which was performed in the past. If a plaintiff
 8 is able to perform previous work, that Plaintiff is deemed not
 9 disabled. 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv).
 10 At this step, plaintiff's residual functional capacity ("RFC")
 11 assessment is considered. If plaintiff cannot perform this work,
 12 the fifth and final step in the process determines whether
 13 plaintiff is able to perform other work in the national economy in
 14 view of plaintiff's residual functional capacity, age, education
 15 and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v),
 16 416.920(a)(4)(v); *Bowen v. Yuckert*, 482 U.S. 137 (1987).

17 The initial burden of proof rests upon plaintiff to establish
 18 a *prima facie* case of entitlement to disability benefits.

19 *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th Cir. 1971); *Meanel v.*
 20 *Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999). The initial burden is
 21 met once plaintiff establishes that a physical or mental
 22 impairment prevents the performance of previous work. The burden
 23 then shifts, at step five, to the Commissioner to show that (1)
 24 plaintiff can perform other substantial gainful activity and (2) a
 25 "significant number of jobs exist in the national economy" which
 26 plaintiff can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9th
 27 Cir. 1984).

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STANDARD OF REVIEW

Congress has provided a limited scope of judicial review of a Commissioner's decision. 42 U.S.C. § 405(g). A Court must uphold the Commissioner's decision, made through an ALJ, when the determination is not based on legal error and is supported by substantial evidence. See *Jones v. Heckler*, 760 F.2d 993, 995 (9th Cir. 1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). "The [Commissioner's] determination that a plaintiff is not disabled will be upheld if the findings of fact are supported by substantial evidence." *Delgado v. Heckler*, 722 F.2d 570, 572 (9th Cir. 1983) (citing 42 U.S.C. § 405(g)). Substantial evidence is more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d 1112, 1119 n. 10 (9th Cir. 1975), but less than a preponderance. *McAllister v. Sullivan*, 888 F.2d 599, 601-602 (9th Cir. 1989); *Desrosiers v. Secretary of Health and Human Services*, 846 F.2d 573, 576 (9th Cir. 1988). Substantial evidence "means such evidence as a reasonable mind might accept as adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (citations omitted). "[S]uch inferences and conclusions as the [Commissioner] may reasonably draw from the evidence" will also be upheld. *Mark v. Celebrezze*, 348 F.2d 289, 293 (9th Cir. 1965). On review, the Court considers the record as a whole, not just the evidence supporting the decision of the Commissioner. *Weetman v. Sullivan*, 877 F.2d 20, 22 (9th Cir. 1989) (quoting *Kornock v. Harris*, 648 F.2d 525, 526 (9th Cir. 1980)).

26 It is the role of the trier of fact, not this Court, to
27 resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. If

1 evidence supports more than one rational interpretation, the Court
2 may not substitute its judgment for that of the Commissioner.
3 *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579
4 (9th Cir. 1984). Nevertheless, a decision supported by
5 substantial evidence will still be set aside if the proper legal
6 standards were not applied in weighing the evidence and making the
7 decision. *Brawner v. Secretary of Health and Human Services*, 839
8 F.2d 432, 433 (9th Cir. 1987). Thus, if there is substantial
9 evidence to support the administrative findings, or if there is
10 conflicting evidence that will support a finding of either
11 disability or nondisability, the finding of the Commissioner is
12 conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir.
13 1987).

14 **ALJ'S FINDINGS**

15 At the outset, the ALJ found plaintiff met the DIB
16 requirements through December 31, 2005. (Tr. 21.) The ALJ found at
17 step one that plaintiff has not engaged in substantial gainful
18 activity since onset. (Tr. 23.) At steps two and three, the ALJ
19 found that plaintiff suffers from degenerative disk disease and
20 COPD, impairments that are severe but which do not alone or
21 combination meet or medically equal a Listing impairment. (Tr.
22 23-24.) The ALJ found plaintiff less than completely credible.
23 (Tr. 25-26.) At step four, relying on the VE, the ALJ found
24 plaintiff's RFC for a wide range of light work prevents him from
25 performing his past relevant work. (Tr. 24, 27, 368-369.) At step
26 five, again relying on the vocational expert, the ALJ found there
27 are other light unskilled jobs plaintiff could perform, including
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1 assembler, cashier and cleaner/housekeeper. (Tr. 28, 370.)

2 Accordingly, the ALJ found that plaintiff is not disabled as
3 defined by the Social Security Act.

4 **ISSUES**

5 Plaintiff contends that the Commissioner erred as a matter of
6 law by failing to properly weigh the medical evidence, including
7 the opinion of his treating pulmonologist, Todd Green, M.D. (Ct.
8 Rec. 14 at 10-13.) The Commissioner responds that the ALJ
9 appropriately weighed the medical evidence and asks the Court to
10 affirm the decision. (Ct. Rec. 17 at 11-12).

11 **DISCUSSION**

12 **Weighing medical evidence**

13 In social security proceedings, the claimant must prove the
14 existence of a physical or mental impairment by providing medical
15 evidence consisting of signs, symptoms, and laboratory findings;
16 the claimant's own statement of symptoms alone will not suffice.
17 20 C.F.R. § 416.908. The effects of all symptoms must be
18 evaluated on the basis of a medically determinable impairment
19 which can be shown to be the cause of the symptoms. 20 C.F.R. §
20 416.929. Once medical evidence of an underlying impairment has
21 been shown, medical findings are not required to support the
22 alleged severity of symptoms. *Bunnell v. Sullivan*, 947, F. 2d
23 341, 345 (9th Cir. 1991).

24 A treating physician's opinion is given special weight
25 because of familiarity with the claimant and the claimant's
26 physical condition. *Fair v. Bowen*, 885 F. 2d 597, 604-05 (9th
27 Cir. 1989). However, the treating physician's opinion is not
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1 "necessarily conclusive as to either a physical condition or the
 2 ultimate issue of disability." *Magallanes v. Bowen*, 881 F.2d 747,
 3 751 (9th Cir. 1989) (citations omitted). More weight is given to
 4 a treating physician than an examining physician. *Lester v.*
 5 *Cater*, 81 F.3d 821, 830 (9th Cir. 1996). Correspondingly, more
 6 weight is given to the opinions of treating and examining
 7 physicians than to nonexamining physicians. *Benecke v. Barnhart*,
 8 379 F. 3d 587, 592 (9th Cir. 2004). If the treating or examining
 9 physician's opinions are not contradicted, they can be rejected
 10 only with clear and convincing reasons. *Lester*, 81 F. 3d at 830.
 11 If contradicted, the ALJ may reject an opinion if he states
 12 specific, legitimate reasons that are supported by substantial
 13 evidence. See *Flaten v. Secretary of Health and Human Serv.*, 44
 14 F. 3d 1435, 1463 (9th Cir. 1995).

15 In addition to the testimony of a nonexamining medical
 16 advisor, the ALJ must have other evidence to support a decision to
 17 reject the opinion of a treating physician, such as laboratory
 18 test results, contrary reports from examining physicians, and
 19 testimony from the claimant that was inconsistent with the
 20 treating physician's opinion. *Magallanes v. Bowen*, 881 F.2d 747,
 21 751-52 (9th Cir. 1989); *Andrews v. Shalala*, 53 F.3d 1042-43 (9th
 22 Cir. 1995).

23 Plaintiff contends that the ALJ failed to properly credit
 24 the opinion of treating physician Dr. Green that plaintiff is
 25 limited to sedentary, rather than light, work. (Ct. Rec. 14 at
 26 12-13.)

27 The ALJ gave little weight to Dr. Green's RFC for sedentary
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1 work because: (1) Dr. Green performed a one-time examination; (2)
2 he did not have the benefit of reviewing plaintiff's longitudinal
3 records; and (3) his opinion is inconsistent with objective
4 medical evidence. (Tr. 26.)

5 Dr. Green examined plaintiff on February 21, 2006. (Tr. 304-
6 305.) He diagnosed a pulmonary nodule and moderate to severe
7 COPD. (Tr. 305.) Dr. Green recommended chest imaging of the
8 nodule, additional antibiotics, flonase for sinusitis, and
9 albuterol for breathing as needed. (Tr. 305.) The only
10 additional record from Dr. Green is a letter dated August 28,
11 2006, opining that plaintiff's COPD causes at least a moderately
12 severe impairment and he is capable of sedentary work. (Tr. 319.)

13 The ALJ opined:

14 Although Dr. Green is a specialist in pulmonary
diseases, his one-time examination of the claimant
15 could not have provided him with a detailed,
longitudinal picture of the claimant's impairments.
16 Physical examinations have demonstrated that the
claimant has mildly diminished breath sounds and mild
17 interstitial prominence. Although he has been
diagnosed with moderately severe pulmonary disease,
18 medical records indicate that his condition has
responded to medication and that he has experienced only
19 two exacerbations of his [COPD] since his alleged
onset date of disability. Based on the foregoing
20 the undersigned has rejected the limitations indicated
by Dr. Green.

21 (Tr. 26.)

22 Dr. Green's report indicates he reviewed the January 18, 2006
chest x-ray and administered pulmonary tests. (Tr. 304.) Dr.
23 Green's report does not indicate that he had any other records to
24 review.

25 The ALJ rejected Dr. Green's opinion that plaintiff's COPD
limits him to sedentary work because it is inconsistent with
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1 objective medical evidence. (Tr. 26.) The ALJ is correct.
2 Examples include the opinion of treating physician Nathan Stime,
3 M.D., in 2000 that plaintiff could perform light work (Tr. 261);
4 the notation of examining physician Edgar Figueroa, M.D., in May
5 of 2002 that plaintiff said he had untreated emphysema and had not
6 seen a physician in over a year. Dr Figueroa opined emphysema
7 "does not appear to be severe at this time" (Tr. 264-265); records
8 of examining physician Robert Rose, M.D., in October of 2004 that
9 plaintiff has used inhalers in the past but not currently. Dr
10 Rose assessed COPD symptoms with mild to moderate exertion. (Tr.
11 291, 293.) An ER record from January 19, 2006 indicates difficulty
12 breathing; plaintiff had been seen the previous day and diagnosed
13 with asthmatic bronchitis but did not fill the prescriptions given
14 because he said he could not afford it. After being given three
15 nebulized treatments in the hospital, plaintiff felt significantly
16 improved. (Tr. 317.) Art Flores, PAC, noted on July 31, 2006,
17 plaintiff's only current medication is zyrtec for allergies. (Tr.
18 329.) Mr. Flores notes that after being out of medication for one
19 week in October of 2006, plaintiff experienced shortness of
20 breath, wheezing and coughing, while on his medication he was
21 doing well. (Tr. 343.) The reasons stated by the ALJ for
22 discrediting Dr. Green's opinion are legitimate, specific, and
23 supported by substantial evidence in the record. See *Lester v.*
24 *Chater*, 81 F. 3d 821, 830-831 (9th Cir. 1995)(holding that the ALJ
25 must make findings setting forth specific, legitimate reasons for
26 rejecting the treating physician's contradicted opinion).

27 To further aid in weighing the conflicting medical evidence,
28 the ALJ evaluated plaintiff's credibility and found him less than

1 fully credible. (Tr. 25-26.) Credibility determinations bear on
 2 evaluations of medical evidence when an ALJ is presented with
 3 conflicting medical opinions or inconsistency between a claimant's
 4 subjective complaints and diagnosed condition. See *Webb v.*
 5 *Barnhart*, 433 F. 3d 683, 688 (9th Cir. 2005).

6 It is the province of the ALJ to make credibility
 7 determinations. *Andrews v. Shalala*, 53 F. 3d 1035, 1039 (9th Cir.
 8 1995). However, the ALJ's findings must be supported by specific
 9 cogent reasons. *Rashad v. Sullivan*, 903 F. 2d 1229, 1231 (9th
 10 Cir. 1990). Once the claimant produces medical evidence of an
 11 underlying medical impairment, the ALJ may not discredit testimony
 12 as to the severity of an impairment because it is unsupported by
 13 medical evidence. *Reddick v. Chater*, 157 F. 3d 715, 722 (9th Cir.
 14 1998). Absent affirmative evidence of malingering, the ALJ's
 15 reasons for rejecting the claimant's testimony must be "clear and
 16 convincing." *Lester v. Chater*, 81 F. 3d 821, 834 (9th Cir. 1995).
 17 "General findings are insufficient: rather the ALJ must identify
 18 what testimony not credible and what evidence undermines the
 19 claimant's complaints." *Lester*, 81 F. 3d at 834; *Dodrill v.*
 20 *Shalala*, 12 F. 3d 915, 918 (9th Cir. 1993).

21 The ALJ relied on several factors when he assessed
 22 credibility (an assessment unchallenged on appeal): plaintiff's
 23 failure to follow recommended treatment and minimal treatment
 24 efforts, his daily activities, and the objective medical evidence.
 25 (Tr. 25.) Plaintiff's inconsistent treatment efforts have been
 26 discussed. The ALJ points out plaintiff's daily activities in
 27 October of 2004 (a month prior to onset) included driving,
 28 shopping and cooking. (Tr. 25, citing Exhibit 8F/1.) In July of

1 2006, the ALJ observes plaintiff said he walked daily for
 2 exercise. At the hearing plaintiff testified he does his own
 3 laundry and shops. (Tr. 25.) Some of the objective medical
 4 evidence has been discussed. The ALJ notes that with respect to
 5 plaintiff's back complaints, an examining physician opined that
 6 "the claimant's pain complaints appeared to be out of proportion
 7 to the physical findings." (Tr. 25, referring to Exhibit 4F/4.)

8 The ALJ's reasons for finding plaintiff less than fully
 9 credible are clear, convincing, and fully supported by the record.

10 See *Thomas v. Barnhart*, 278 F. 3d 947, 958-959 (9th Cir.
 11 2002) (proper factors include inconsistencies in plaintiff's
 12 statements, inconsistencies between statements and conduct, and
 13 extent of daily activities). Noncompliance with medical care or
 14 unexplained or inadequately explained reasons for failing to seek
 15 medical treatment also cast doubt on a claimant's subjective
 16 complaints. 20 C.F.R. §§ 404.1530, 426.930; *Fair v. Bowen*, 885 F.
 17 2d 597, 603 (9th Cir. 1989).

18 The ALJ properly discounted Dr. Green's opinion based on his
 19 status as a one-time examining physician, his apparent lack of
 20 longitudinal records, and other medical records. These are
 21 specific legitimate reasons supported by substantial evidence for
 22 the weight given to Dr. Green's opinion.

23 The ALJ is responsible for reviewing the evidence and
 24 resolving conflicts or ambiguities in testimony. *Magallanes v.*
 25 *Bowen*, 881 F. 2d 747, 751 (9th Cir. 1989). It is the role of the
 26 trier of fact, not this court, to resolve conflicts in evidence.
 27 *Richardson*, 402 U.S. at 400. The court has a limited role in
 28 determining whether the ALJ's decision is supported by substantial

1 evidence and may not substitute its own judgment for that of the
 2 ALJ, even if it might justifiably have reached a different result
 3 upon de novo review. 42 U.S.C. § 405 (g).

4 The ALJ provided clear and convincing reasons supported by
 5 the record for finding plaintiff's allegations not fully credible.
 6 The ALJ weighed the medical evidence and failed to adopt some of
 7 the opinions of Dr. Green. Instead, the ALJ relied on the
 8 opinions of other examining and consulting physicians and on his
 9 assessment of plaintiff's credibility. The ALJ gave specific and
 10 legitimate reasons, supported by substantial evidence, for
 11 rejecting some of the assessed limitations. The ALJ's assessment
 12 of the medical and other evidence is supported by the record and
 13 free of legal error.

14 **CONCLUSION**

15 Having reviewed the record and the ALJ's conclusions, this
 16 court finds that the ALJ's decision is free of legal error and
 17 supported by substantial evidence..

18 **IT IS ORDERED:**

19 1. Defendant's Motion for Summary Judgment (**Ct. Rec. 16**) is
 20 **GRANTED**.

21 2. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 13**) is
 22 **DENIED**.

23 The District Court Executive is directed to file this Order,
 24 provide copies to counsel for Plaintiff and Defendant, enter
 25 judgment in favor of Defendant, and **CLOSE** this file.

26 DATED this 16th day of December, 2008.

27 s/ James P. Hutton

JAMES P. HUTTON

28 UNITED STATES MAGISTRATE JUDGE